

PETITION OF KRAUS JOINT	:	IN THE CIRCUIT COURT
VENTURE FOR JUDICIAL REVIEW	:	
OF THE DECISION OF BOARD OF	:	FOR
APPEALS/HARFORD COUNTY	:	
COUNCIL IN THE CASE OF THE	:	HARFORD COUNTY
KRAUS JOINT VENTURE	:	
	:	
	:	
v.	:	
	:	
HARFORD COUNTY COUNCIL/	:	
BOARD OF APPEALS	:	Case No. 12C99002059AA

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on Kraus Joint Venture's (hereinafter "KJV") Petition for Judicial Review of the August 3, 1999, decision of the Harford County Council/Board of Appeals (hereinafter "the Board"). The Board's decision ratified and adopted the Hearing Examiner's April 1, 1999, recommendation which rejected KJV's assertion of a non-conforming use as described by KJV. The primary issue on appeal is whether KJV's use of the property constitutes an illegal extension or a permissible intensification of the non-conforming use that existed on the property when it was purchased by KJV.

Factual Background

On December 1, 1989, Mr. Leonard Kraus, Sr., a member of KJV, purchased the property located at 1233 Joppa Farm Road at public auction. On the

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day of sale Mr. Kraus was provided with a letter from Mr. Conklin, the seller, that was dated December 1, 1989, wherein Mr. Conklin confirmed that he had used the property in question for an excavating business and storage and repair of equipment since September, 1946. However, Mr. Kraus had not checked with the Harford County Zoning Department to determine the allowable uses of the property, nor had he been on the property before the auction date.

After purchasing the property, Mr. Kraus' brother-in-law began to use the subject property for dump truck parking. For a couple of years Superior Concrete shared the subject property, parking trucks and storing some equipment on the property. Presently, the subject property is being leased to Dilworth Trucking for storage, repair, and maintenance of heavy equipment. Dilworth Trucking uses an area of the property with dimensions of 150 feet by 250 feet. The house on the property is being rented to residential tenants.

On April 4, 1997, the Department of Planning and Zoning visited the subject property in response to an inquiry concerning the use of the property. As a result of the April, 1997 visit, the Department issued a long list of violations and brought to light a Board of Appeals case, No. 970, filed by Mr. Conklin in 1964.

In 1957 Mr. Conklin was storing some contractor's equipment on the subject property. The nature and extent of this equipment is not totally clear from the record; however, the Hearing Examiner concluded that the equipment did not exceed two dump trucks, a backhoe, a bulldozer/front-end loader and a low-boy. By virtue of

the 1957 Zoning Ordinance, the storage of a contractor's equipment on the subject property resulted in a non-conforming use.

In 1964 Mr. Conklin applied for permission to build a utility building to store and repair a backhoe, bulldozer and low-boy trailer. The 1964 Board of Appeals case allowed the construction and use of the proposed utility building "so long as the building is used in a non-commercial manner outlined above." That "manner" was to use the building to store three pieces of personally used equipment "not for a business use."

Procedural Background

By letter dated November 6, 1997, a request for interpretation, pursuant to Section 267-7 of the Harford County Zoning Code, regarding the permitted uses on the property at 1233 Joppa Farm Road, was furnished to the Department of Planning and Zoning by KJV. KJV maintained that it had a valid non-conforming use to operate an excavating business or a similar type of business, such as trucking or truck storage, as well as storage and repair of equipment and motor vehicles associated with business activities, on the subject property while the work was to be done at the premises of other persons. By letter dated January 16, 1998, the Director of Planning and Zoning, Ms. Arden Case Holdridge, responded to the request for interpretation and denied the existence of such a non-conforming use. In said letter, Ms. Holdridge defined the parameters of the existing non-conforming use, limiting it to the storage of three pieces of personally used equipment, not for a business use. She further cited a 1964 Board of Appeals case and Zoning Certificate allowing the conversion or

construction of a utility building "so long as the building is used in the non-commercial manner" outlined in that 1964 case which related to the three pieces of personally used equipment.

A timely appeal was filed to the Board of Appeals and a hearing was held on December 16, 1998, before the Hearing Examiner. A decision was rendered by the Hearing Examiner dated April 1, 1999. The Hearing Examiner concluded that KJV's use of the property constituted an illegal extension of the non-conforming use established by Mr. Conklin. The Hearing Examiner reasoned that by substituting and expanding the use, KJV abandoned the former non-conforming use.

KJV requested final argument and at its session of August 3, 1999, the Harford County Council, sitting as the Board of Appeals, upheld that recommendation by a vote of six to one. On August 12, 1999, KJV filed a Petition for Judicial Review of the Board's August 3, 1999, decision.

Standard of Review

An administrative agency's finding shall be upheld if there is any evidence that makes the issue "fairly debatable." See Eastern Service Center v. Cloverland Farms Dairy, 130 Md. App. 1, 9 (2000) (citing People's Counsel v. Beachwood, 107 Md.App. 627, 637 (1995)). An issue is fairly debatable if the administrative agency's decision is supported by " . . . competent, material and substantial evidence in the record." See Entzian v. Prince George's County, 32 Md. App. 256 (1976).

"Findings of fact must be upheld 'if they are based on substantial evidence and if reasoning minds could reach the same conclusion based on the record.'" See Eastern Service Center, 130 Md. at 9 (citing People's Counsel v. Prosser Co., 119 Md. App. 150, 167-68 (1998)). An agency's conclusions of law, however, are not afforded the same deference and are reviewed using the abuse of discretion standard. See id. (citing People's Counsel v. Prosser Co., 119 Md. App. 150, 168 (1998); County Comm'rs. v. Zent, 86 Md. App. 745, 753 (1991)).

Discussion

The final decision of the County Council/Board of Appeals ratified and adopted the Hearing Examiner's recommendation dated April 1, 1999. The Hearing Examiner's recommendation upheld the Zoning Administrator's interpretation contained in the letter of January 16, 1998. As summarized by the Hearing Examiner, that letter stated:

1. The property located at 1233 Joppa Farm Road does not enjoy the status of a non-conforming use as described by KJV.
2. A resident is allowed to keep on the property three (3) pieces of personal use equipment similar to a backhoe, bulldozer, or low-boy trailer approved in Board of Appeals Case No. 970, decided in 1964.
3. The equipment may be used for non-commercial activity on site and for work performed off-site.
4. Any other non-residential use would require Board of Appeals approval.

In recommending that the subject property did not enjoy the status of a non-conforming use as described by the applicant, the Hearing Examiner concluded that pursuant to Harford County Code, Section 267-20(c), "the non-conforming use established by Mr. Conklin terminated and was abandoned by the present owner."

Section 267-20(c) of the Harford County Code states:

In the event a non-conforming use ceases for a period of one year or more, then the non-conforming use shall be deemed abandoned and compliance with this Part I shall be required. The casual, temporary or illegal use of land or structure does not establish the existence of a non-conforming use.

Harford County Code § 267-20(c). The Hearing Examiner concluded that KJV's use of the property was an illegal expansion of and substitution for the non-conforming use; therefore, the non-conforming use ceased for a period of one year or more and was abandoned.

In McKemy v. Baltimore County, 39 Md. App. 257 (1978), the Court of Special Appeals established the four criteria for determining whether a current activity is within the scope of a non-conforming use. Id. at 270. Those criteria are:

1. To what extent does the current use of these lots reflect the nature and purpose of the original non-conforming use;
2. Is the current use merely a different manner of utilizing the original non-conforming use or does it constitute a use different in character, nature, and kind;
3. Does the current use have a substantially different effect upon the neighborhood;

4. Is the current use a "drastic enlargement or extension" of the original non-conforming use. Id.

Examining the first criterion, whether the "current use reflects the nature and purpose of the non-conforming use," the Hearing Examiner described the present use of the property as "a[n] active trucking operation with numerous tandem-axle dump trucks, a variety of associated equipment, [and] a large fenced in parking area . . ." The Hearing Examiner heard testimony from Mr. Kraus regarding the nature and extent of the present use of the subject property and that testimony supported the Hearing Examiner's conclusion.

With regards to the nature and purpose of the non-conforming use, the Hearing Examiner found that the non-conforming use was "relatively minor, non-intrusive, and [for] personal use." In reaching this conclusion, the Hearing Examiner relied heavily on the testimony of Ocid C. Jackson, the 1964 Board of Appeals decision, and the statement of the former owner, Mr. Conklin, in that Board of Appeals case. The Hearing Examiner acknowledged that much of the testimony regarding the extent and identity of the equipment used was imprecise; however, the Hearing Examiner accorded Mr. Jackson's testimony significant weight because of its clarity. The Hearing Examiner noted that:

Mr. Jackson clearly recalled that the property was never used for a business and, according to Mr. Jackson, Mr. Conklin had a dump truck, perhaps two dump trucks, a low-boy, and a front-end loader, none of which ever moved, and a bulldozer. . . Mr. Jackson was very certain in his testimony that the vehicles were never operable for the entire time they existed on the property, with the

exception of the one bulldozer which Mr. Conklin drove around the property.

Based on this evidence, the Hearing Examiner found that the present use of the property "greatly exceeds" the nature and purpose of the non-conforming use.

The second criterion is whether "the current use [is] merely a different manner of utilizing the original non-conforming use or . . . a use different in character, nature, and kind." It is not disputed that the property is presently being used to run a "modern-day excavating business." Furthermore, the Hearing Examiner made a first-hand determination that Mr. Jackson's testimony was credible and that it carried significant weight on the issue of the extent and identity of the equipment previously used on the property. Mr. Jackson testified that there were four or five pieces of equipment on the property and that only one of those pieces of equipment, a bulldozer, was operable. This testimony supports the Hearing Examiner's conclusion that the present use of the subject property is different in character, nature, and kind than the original non-conforming use.

The third criterion is whether the current use has a "substantially different effect on the neighborhood." The Hearing Examiner found that the current use does have a substantially different effect on the neighborhood. Neighbors of the subject property testified that Mr. Conklin's use of the property did not disturb them. In fact, the neighbors testified that, to their knowledge, the only piece of equipment that was even operated by Mr. Conklin was the bulldozer. On the other hand, neighbors testified that the current use of the subject property has irritated them by

increasing noise and fumes. Furthermore, the neighbors testified that the current use of the subject property has lowered property values.

The final criterion is whether the "current use [is] a drastic enlargement or extension of the non-conforming use." The Hearing Examiner found that the current use is a drastic enlargement. The Hearing Examiner previously found, based on Mr. Kraus' testimony, that an active trucking operation is presently being operated on the subject property. Furthermore, based on Mr. Jackson's testimony and the testimony of neighbors, the only piece of equipment that was operable when Mr. Conklin established the non-conforming use was a bulldozer.

Applying the applicable standard of review, there is competent and material evidence to support the Hearing Examiner's conclusion that the current use of the subject property exceeds the scope of the original non-conforming use. KJV argues this is merely a case of intensification. Maryland recognizes the theory of "intensification." See, e.g., County Comm'rs. v. Zent, 86 Md. App. 745, 753-58 (1991); McKemy, 39 Md. App. at 269-70. By applying the factors enumerated in McKemy, however, the Hearing Examiner, based on competent and material evidence, determined that the present use was an illegal extension rather than a permissible intensification of the non-conforming use. Furthermore, it was proper for the Hearing Examiner to determine whether, pursuant to Harford County Code, Section 267-20(c), the non-conforming use had been abandoned by virtue of its extension. See McKemy, 39 Md. App. at 270.

Harford County Code, Section 267-20(c), states that the "illegal use of a land structure does not establish the existence of a non-conforming use." The Hearing Examiner found, based on competent and material evidence, that the use of the subject property exceeds the scope of the original non-conforming use; therefore, KJV's use of the subject property has been an illegal use. See Harford County Code § 267-20(c). According to Section 267-20(c), an illegal use of property "does not establish the existence of a non-conforming use." See id. Consequently, by reason of this substituted illegal use, the non-conforming use established by Mr. Conklin ceased for a period of a year or more and is deemed abandoned. See id.

The Zoning Administrator's interpretation, which was affirmed by the Hearing Examiner on April 1, 1999, and ratified by the Board, recognized the existence of the original non-conforming use. The Hearing Examiner found that the original non-conforming use was abandoned but recommended that the Zoning Administrator's interpretation, which recognized the original non-conforming use, be upheld. The Board of Appeals did so. The Harford County People's Council has not appealed the Decision of the Board and, therefore, the issue of whether it was proper to reinstate the original non-conforming use after finding that it had been abandoned is not before the Court.

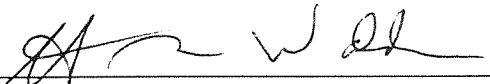
Conclusion

The Board's ratification of the Hearing Examiner's recommendations is affirmed. There was competent and material evidence on the record to support a finding that KJV's use of the subject property constituted an illegal extension.

ORDER

Accordingly, it is this 19 day of December, 2000, by the Circuit
Court for Harford County,

ORDERED that the decision of the Harford County Council/Board of
Appeals be and is hereby **AFFIRMED**.



STEPHEN M. WALDRON Judge

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